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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1948

468
No. _____

JOHN BARCOTT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT AND BRIEF
IN SUPPORT THEREOF

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TO THE HONORABLE THE CHIEF JUSTICE OF
THE UNITED STATES AND THE ASSOCI-
ATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Petitioner, John Barcott, respectfully applies for the allowance of a Writ of Certiorari to review a decision of the Court of Appeals for the Ninth Circuit entered on the 17th day of September, 1948 (R. 485), affirming a judgment of the District Court for the Western District of Washington, Southern Division entered on the 24th day of November, 1947 (R. 472-476).

The Indictment (R. 2) charged the petitioner in three counts with separate violations of Section 145

(b), U. S. Code, Title 26. Petitioner was found guilty on all three counts by verdict of the jury.

Opinion of the Court Below

The judgment of the District Court was affirmed by the Circuit Court of Appeals, whose opinion commences on page 486 of the Transcript of Record.

Jurisdiction

Jurisdiction of this Court is invoked under Judicial Code, Section 240 (a), 28 U.S.C., Section 347 (a). The judgment of the Court of Appeals was entered on September 17, 1948. An order denying Petition for Rehearing was entered on November 1, 1948. The time for filing this petition was extended to and including December 20, 1948, by order of this court dated November 24, 1948.

Questions Presented

1. Is proof of the acquisition of assets in excess of reported income for a given year sufficient to establish the necessary corpus for the crime of income tax evasion?
2. Where there is no evidence as to a taxpayer's net worth prior to the commencement of a taxable period, is evidence of purchase of assets in excess of income for said taxable period sufficient to establish an increase in the net worth of said taxpayer?
3. Where a taxpayer is furnished with a Bill of Par-

particulars setting forth the sources from which alleged unreported income was received by him, and the evidence fails to show any unreported income derived from the particularized sources, is there such a variance and failure of proof as to warrant a judgment of acquittal?

4. In the trial of a criminal cause of action where the prosecution relies on circumstantial evidence, should the case be submitted to the deliberation of the jury where the circumstances offered in evidence are not inconsistent with every hypotheses except that of guilt?

Statute and Constitutional Provisions Involved

Petitioner was prosecuted under 26 U.S.C. 145 (b), enacted as part of the Internal Revenue Code on February 10, 1939, c. 2, Section 145, 53 Stat., which is as follows:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

The following portion of the Sixth Amendment to the Constitution of the United States is applicable in this case:

“In all criminal prosecution the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *”

Reasons Relied on for Issuance of Writ

1. The interpretation and construction of the criminal sections of the Internal Revenue Code are of vital concern to every American taxpayer. If the decision of the Court of Appeals in this case is a fair expression of the law of the land it should be so announced by the Supreme Court so that every taxpayer will be clearly forewarned that acquisition of any assets in a given year over and above his reported income will constitute prima facie evidence of income tax evasion and will be sufficient to place the burden upon him to prove his own innocence in the transaction.

2. The decision of the Court of Appeals is in conflict with the decisions of other Circuits as it authorized submission of the case to the jury on circumstantial evidence when the circumstances relied on are not inconsistent with every other theory except guilt.

3. The decision of the Court of Appeals is in conflict with decisions of other Circuits, as well as its own prior decisions, when it fails to limit the Government to proving facts in support of the charge made in the Indictment as particularized in the Bill of Particulars.

Statement of the Case

Petitioner owns the California Oyster House located in Tacoma, Washington, which he has operated since

the year 1919. He was indicted for the crime of income tax evasion, the indictment being in three counts (R.2), the substance of the Government charges being as follows, figures being on a community property basis:

<i>Calendar Year</i>	<i>Income Reported</i>	<i>Actual Income</i>	<i>Tax Reported</i>	<i>Actual Tax Due</i>
1943 --	\$6,720.40	\$12,406.33	\$1,545.38	\$3,646.25
1944 --	5,632.57	9,926.61	1,288.45	2,727.85
1945 --	7,388.98	11,138.92	1,833.36	3,201.96

The Indictment sets out the sources of unreported income as follows:

1. Dividends and interest.
2. Income from business (R. 2).

Upon motion of the defendant (petitioner herein) a Bill of Particulars was ordered which set out that the unreported income from business is the California Oyster House (R. 17). During the trial it was stipulated that all income from dividends and interest was accurately reported (R. 402). Therefore, the only source from which defendant allegedly received income and failed to report was the Oyster House.

It is to be specifically noted that the defendant filed income tax returns for the years in question and that a report of income from operation of the Oyster House was made in each instance. (Pltfs. Exs. 1, 2, 3.)

It is also to be noted that the defendant maintained books of account for the Oyster House showing his

daily receipts, expenditures and costs of labor. (Defs. Exs. A1, A2; R. 206-211.)

In attempting to prove the case, the prosecution showed the following:

1. That the defendant was investigated when it was learned he acquired ten \$1000 bills for smaller currency (R. 71-72).

2. That he allowed an agent to inventory the contents of his safe deposit box which showed purchase of war bonds in the sum of \$59,750 for the three years in question, as well as \$23,000 in cash (R. 126, 128, 129).

3. That after the foregoing box was examined, defendant, on the same day, entered another safe deposit box owned by him (R. 104; Ex. 11).

4. That prior to the years in question defendant had purchased some items of furniture on an instalment contract.

5. That in 1940 he surrendered four shares of stock in a corporation to pay off a \$200 note owing to the corporation since 1932.

(a) That the stock paid a dividend of 6% twenty days later (R. 334, 335).

6. That in 1946, Agent Swanson made an inventory of defendant's known assets from which he concluded that defendant had a net worth in January 1943 of \$57,278.56, which increased as follows:

December 1943	-----	\$ 79,206.60
December 1944	-----	97,462.75
December 1945	-----	116,316.60

for a total increase of \$59,039.04. Swanson admitted he did not know how much cash the defendant may have had in 1942, but assumed it was the same as what was inventoried in 1946 (R. 136). He did not know where the money came from for the purchase of bonds during the three years in question. He *assumed* defendant got the money from the business, stating he had no other knowledge (R. 136). He knew defendant was in business since 1919, but in arriving at a net worth figure he did not consider what the defendant might have been worth when he commenced business; and how much defendant's wife may have brought into the community when she married the defendant. He assumed defendant had nothing at that time (R. 148-149). In determining net worth as of January 1, 1943, the agent arrived at his figure by adding defendant's prior bond purchases to the value of the real estate and restaurant owned by the defendant, and then assumed that defendant's cash assets were identical to those examined and revealed in 1946. Nothing else was considered (R. 137). The witness explained with frankness that in arriving at a net worth figure, "the amount you start with is of little or no consequence for the purpose of determining the increase of that year." The verbatim testimony in this regard is as follows (R. 148-149):

"Q. All of these taxes that you have given the Court and jury the benefit of knowing that were

not paid, were on the assumption that Mr. Barcott had nothing else on January 1, 1943, except what you say was in the box, at that time.

"A. A tax is computed on the increase of certain items.

"Q. Increase during those years?

"A. During those years, not — it wouldn't matter a bit if the amount was less. It's only on the increase that a man makes from the beginning of the year and the end of the year. So the amount that you start with is of little or no consequence for the purpose of determining the increase of that year."

7. That the defendant attempted to bribe the Agent Nielsen in return for a favorable report (R. 75).

Specifications of Error

I

The Court of Appeals for the Ninth Circuit erred in holding that the District Court did not err in refusing to direct a judgment of acquittal and in submitting the case to the jury.

ARGUMENT

I

Sufficiency of the Evidence

(A) Acquisition of Assets in Excess of Reported Income

The following quotation appears in 1 Wharton's Criminal Law (12th Ed.) Sec. 349, page 543:

"Before a conviction can rightfully be had on a criminal charge, the prosecution must show (1) the *corpus delicti*, (2) that it was produced by a criminal act or agency, (3) that the accused did the criminal act, or set in motion the criminal agency, or sustains responsible complicity therewith. Mere proof of conduct exhibiting satisfactory indications of guilt is not sufficient to warrant a conviction, unless there be satisfactory evidence that the particular crime has been committed."

A search of the authorities has failed to reveal any reported case which has extended the rules of criminal proof to the point where a mere increase in assets over reported income established the necessary corpus for criminal prosecution in income tax cases. Frankly, no such authority was expected to be found, as it would place the burden of proving innocence on the defendant.

Analysis of the Government's case fails to reveal evidence of a single dollar of tax due to the United States. The purchase of war bonds in excess of reported income obviously contains no evidence of criminality, and it certainly furnishes no evidence of a tax due.

In *Paschen v. United States*, 70 F. (2d) 491 (C.C.A. 7, 1934), the figures from a very large bank account which defendant maintained under an assumed name were introduced in evidence as proof of income during the current year which he failed to report. The court concluded that this bank account of itself, without some evidence that it was earned in the taxable year, could not be used to show income tax evasion. The specific language used by the court in this regard is as follows:

"The Anderson account was as much Paschen's own account as if it had been carried in his own name. About this there is no controversy. But as to the unidentified balance appearing to have been deposited in the Anderson account during that year, we believe it involves too much of speculation to admit of indulgence in the presumption that, because a few of the items making up the large Anderson account were shown to have been of commercial accounts not included in the tax return, it therefore follows that the large unidentified balance of deposits in the accounts represents also commercial accruals during the year, not included in the tax return. This contention of the Government cannot be allowed."

We agree with the Seventh Circuit Court of Appeals that mere proof of assets in excess of reported income is insufficient to establish criminal liability.

The Circuit Court of Appeals was misled in the same manner as was the trial court. This error consisted of seizing upon a group of suspicious circumstances and probabilities which may well have exhibited indications of guilt, and used these suspicious circumstances and probabilities as the basis for criminal conviction, without searching first for evidence of an actual tax due to the Government.

The Court of Appeal's error is indicated in the following quotation from its opinion:

"The purchases made by appellant were entirely consistent with his statement to the revenue agent that 'I ordinarily accumulate \$5,000 or \$6,000 and purchase U. S. Savings bonds.' It is difficult to give credence to a theory that appellant made the

bond purchases in 1943, 1944 and 1945 with funds accumulated prior to 1943. If that were true why did he not purchase bonds when the funds became available, and it is not consistent with the actions of this man of frugal habits to believe he held certain sums accumulated in 1942 in reserve and apportioned specific portions thereof for the purchase of bonds over a period of three years at regular intervals. It is more in keeping with his frugal nature to conclude that he made his investment as the opportunity offered."

It is to be remembered that the defendant reported income of \$19,741.95 for the three years in question on a community property basis, which amounts to \$39,483.90 as total reported earnings for himself and his wife. With nearly forty thousand dollars of reported earnings, it stands to reason and is admitted that current earnings were being invested by the defendant in U. S. Savings bonds. This does not and cannot mean that bonds were purchased exclusively with current income. The Court of Appeals says it is difficult to give credence to a theory that appellant made bond purchases with funds accumulated prior to 1943. By this language the defendant is placed in the position of proving his innocence. The court speculates and in effect states that it is more probable in the case of this man, because he is of frugal habits, that his purchases were made with current income. But this is a criminal case in which the courts have no right to indulge in probabilities. Each and every element of the crime must be proven by satisfactory evidence, and where the corpus delicti itself is not proved all the suspicious circumstances in the world cannot make a case.

(B) Net Worth.

A search of the authorities has also failed to reveal that a taxpayer can be found guilty of income tax evasion simply because there was an increase in his net worth. There are some reported cases in which the element of increased net worth was offered in evidence as a circumstance in corroboration of other proof of corpus delicti. In all of these cases there was a firm foundation from which increase in net worth could be subsequently calculated, an element totally lacking in the conclusions of the witness Swanson.

Reference is made to the case of *Gleckman v. United States*, 80 F. (2d) 394, (C.C.A. 8), which appears to be typical of cases where the element of net worth is introduced.

In the *Gleckman* case, as well as in all other cases reviewed, where evidence of net worth was introduced, three general principles were always present. They are as follows:

1. In each case the defendant was engaged in a criminal enterprise.
2. In each case there was evidence of money received during the fiscal year from an *unreported* source.
3. In each case the increase in net worth was calculated from a known or admitted basic figure, and the evidence thereof was used only as a corroborating circumstance and not as proof of corpus delicti.

In the *Gleckman* case financial statements previously made and executed by the defendant were used as the foundation and basis to determine increase in net worth. The evidence showed an illegal, unreported source of income with very large bank deposits identified with the business carried on by the defendant.

In this case it is sought to prove guilt solely on the net worth theory. In the first place it is earnestly submitted that no increase in the defendant's net worth was proven since there was no foundation from which subsequent increases could be calculated. Defendant's net worth as of January 1, 1943 was a speculative estimate based on facts assumed but not known by the witness Swanson when he made an inventory of the defendant's visible assets in the year 1946. Secondly, the case was tried and presented to the jury strictly on the theory that increase in net worth is all that was required to prove the corpus of the case. The Government admitted that their entire case was based on the testimony of the witness Swanson:

"Now as far as our case is concerned it is all contained in one witness, and that is Mr. Swanson here." (R. 415.)

Mr. Swanson himself testified as follows:

"This income was determined on the increase in net worth basis." (R. 116.)

The court instructed the jury that increases in net worth established one of the essential elements in the case, (R. 451).

Assuming that the defendant's net worth as of January 1, 1943 rested on a known or admitted foundation, which it does not, it must be readily apparent that both the prosecution and the trial court proceeded on the theory that increase in net worth alone would establish the corpus necessary for criminal prosecution. All elements of required proof such as proving that there was a tax due to the Government were utterly disregarded, and the jury were told in effect that if they found the defendant had more assets at the end of the year than he had at the beginning of the year and this amount exceeded his reported income for said year, a necessary element of the crime was proven. As stated before, no reported case supports such a theory and no authority for such a proposition could be established without junking our present system of criminal law.

(C) Failure to Confine Proof as Limited by the Bill of Particulars

"In all criminal prosecution the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *" *Sixth Amendment to the Constitution of the United States.*

"When a bill of particulars is once made and served, 'it concludes the rights of all parties who are to be affected by it; and he who has furnished a bill of particulars under it must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration.' *Commonwealth v. Giles*, 1 Gray (Mass.) 466, cited and approved in *Dunlop v. United States*, 165 U. S. 486, 491, 17

Sup. Ct. 375, 41 L. Ed. 799. In *United States v. Adams Express Co.* (D.C.) 119 Fed. 240, it is said:

“ ‘The office of a bill of particulars is to advise the court, or more particularly the defendant, of what facts, more or less in detail, he will be required to meet, and the court will limit the government in its evidence to those facts set forth in the bill of particulars.’ ” *United States v. Pierce*, 245 Fed. 888 at page 890.

This rule was followed in all of the following cases:

United States v. Adams Express Co., (Dist. Court, S. D. Iowa, E.D. 1902), 119 Fed. 240.

Kettenbach v. United States, (C.C.A. 9, 1913), 202 Fed. 377.

Braatenlien v. United States, (C.C.A. 8, 1945), 147 F. (2d) 888.

United States v. McKay (Dist. Court E.D. Mich., S.D. 1942), 45 Fed. Supp. 1001.

United States v. Gouled (Dist. Court, S.D. N.Y. 1918), 253 Fed. 239.

United States v. Allied Chemical & Dye Corp., (Dist. Court, S.D. N.Y. 1941), 42 Fed. Supp. 425.

It was disregarded in the case at bar. Defendant was told his tax defalcations were in income from the Oyster House. Although he reported income tax from this source, and kept business records thereon, no evidence of falsity was offered as to either. The case was attempted to be proved on a net worth theory, without

any regard to the particularized source from which it was alleged fraud occurred.

By reason of the authorities cited herein, failure to present evidence of unreported income from the Oyster House necessitated a judgment of acquittal.

(D) Circumstantial Evidence Consistent with Innocence.

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. *Union Pacific Coal Co. v. United States*, 173 F. 737, 740 (C.C.A. 8); *Wiener v. United States*, 282 F. 799, 801 (C.C.A. 3); *Yusem v. United States*, 8 F. (2d) 6 (C.C.A. 3); *Ridenour v. United States* 14 F. (2d) 888 (C.C.A. 3)." (*Nicola v. United States*, 72 F. (2d) 780 at page 786.)

It is submitted as a common sense proposition that each of the following circumstances are as consistent with innocence as with guilt:

1. Changing small currency for that of larger denominations.
2. Purchase of war bonds in excess of current income.
3. Entering one's own safe deposit box.
4. Purchase of furniture on instalment contract.
5. Surrender of stock in satisfaction of indebtedness to corporation for purchase of same.

All of these factors were admitted as evidence of guilt and the Circuit Court in its opinion was compelled to rely thereon in an effort to substantiate the judgment of the trial court.

CONCLUSION

From the foregoing, it is concluded that the Government failed to establish that there was any tax due whatsoever or that there was a failure to report all income from the Oyster House.

Any other conclusion would place the burden on the taxpayer to prove his innocence in a criminal action, merely because he acquired an asset valued in excess of his current income. It is therefore earnestly and respectfully submitted that the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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